



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 5

TO: MEMBERS OF THE STUDY COMMITTEE ON THE REVIEW OF CRIMINAL PENALTIES

FROM: David Moore and Michael Queensland, Staff Attorneys

RE: Recommendations of the Subcommittees on Obsolete Misdemeanors and Penalty Alignment and Organization

DATE: November 5, 2014

Following the first meeting of the Study Committee on the Review of Criminal Penalties, Representative Rob Hutton, Chair of the Study Committee, formed two subcommittees to work on certain issues within the Study Committee's scope and make recommendations on these topics to the full Study Committee.¹ These subcommittees—the Subcommittee on Obsolete Misdemeanors, and the Subcommittee on Penalty Alignment and Organization—each met twice and developed recommendations for the full Study Committee's review. The full Study Committee will meet on November 12, 2014 to review both subcommittees' recommendations.

SUBCOMMITTEE ON OBSOLETE MISDEMEANORS

The Subcommittee on Obsolete Misdemeanors, chaired by Representative Adam Neylon, was directed to identify misdemeanor offenses that are appropriate for repeal because they are obsolete or no longer relevant.

¹ The Joint Legislative Council approved the following scope statement for the Study Committee:

The Study Committee is directed to review the penalties for misdemeanor and low-level felony offenses. The committee shall: determine whether current misdemeanor or low-level felony penalties are appropriate; whether any crimes should be classified; and whether any offenses are outdated or should be decriminalized.

Subcommittee's Process

At its first meeting, the Subcommittee identified the following criteria as indicia that a misdemeanor might be obsolete or no longer relevant:

- It is not still possible to commit the offense.
- The offense is not responsive to a problem that still exists.
- Other offenses prohibit the same conduct.

To assist the Subcommittee, Chair Neylon asked 18 state agencies to provide input about whether any misdemeanors within their purview might meet the Subcommittee's criteria for identifying obsolete misdemeanors. The Subcommittee's staff also assembled a list of misdemeanors that appeared to meet the Subcommittee's criteria for the Subcommittee's review.

The Subcommittee noted that the frequency with which a misdemeanor is charged may provide some indication of whether the offense is obsolete or no longer relevant, so the Subcommittee also directed staff to work with the Office of the Director of State Courts to identify misdemeanors that have not been charged recently. Because of logistical issues associated with searching the charging history for each of the more than 900 misdemeanors, Chair Neylon later directed that this research be confined to misdemeanors within the Criminal Code using data the courts provided going back three years. The Subcommittee reviewed the results of this research and lists of misdemeanors identified by agency staff and the Subcommittee's staff at its October 10, 2014 meeting.²

Subcommittee's Recommendations

At its October 10, 2014 meeting, the Subcommittee recommended the following misdemeanors, which were identified by agencies as ones that appeared to meet the Subcommittee's criteria,³ be repealed:

- Section 93.21 (failure by milk contractors to issue required statements).
- Section 93.35 (weather modification).
- Section 100.15 in its entirety and the portion of s. 100.26 (3) that references s. 100.15 (trading stamps).
- Section 120.13 (35) (b) (1) (unlawful presence in school buildings that provokes a breach of the peace).
- Section 199.105 (3) (interference with the Citizens Utility Board).
- Section 199.14 (3) (corrupt practices and conflicts of interest related to the Citizens Utility Board).

² See Memo No. 3, available on the Subcommittee's website, for these results.

³ See Memo No. 3 for the agencies' recommendations.

The Subcommittee also identified the following misdemeanors as obsolete or no longer relevant and recommended they be repealed:

- Section 134.35 (time of filing endorsed on telegrams delivered).
- Section 134.36 (telegraph; divulging message; preference in sending).
- Section 134.37 (divulging message or forging receipt).
- Section 134.38 (companies to post copies of s. 134.37).
- Section 134.39 (fraudulent knowledge of dispatch; injury to wires; interference).
- Section 167.13 (operation of corn shredders purchased prior to June 12, 1909).
- Section 167.18 (threshing machine joints to be covered).
- Section 175.09 (2) and (3) (failure to use standard time).
- Section 175.15 (endurance contests).

The Subcommittee identified s. 97.18, Stats., which criminalizes certain conduct related to serving oleomargarine, as appearing to meet the criteria it established. However, the Subcommittee noted that when a bill was introduced recently to repeal this statute, it was opposed by at least one trade organization. The Subcommittee therefore recommended that the trade organization be invited to testify to the full Study Committee and that the full Study Committee then determine whether s. 97.18, Stats., should be repealed.

Finally, the Subcommittee identified three offenses that are not obsolete, but that in the Subcommittee's judgment should be reduced to civil forfeitures. These offenses are:

- Section 146.085 (charging a fee for the use of a toilet).
- Section 944.36 (solicitation of drinks by employees or entertainers).
- Section 985.03 (publishing legal notices).

The recommendations of the Subcommittee on Obsolete Penalties are contained within LRB-0473/P2.

SUBCOMMITTEE ON PENALTY ALIGNMENT AND ORGANIZATION

The Subcommittee on Penalty Alignment and Organization, chaired by Representative John Spiros, was directed to make recommendations about aligning the penalties of misdemeanors so that crimes of similar severity have similar penalties, and to determine whether any unclassified misdemeanors should be classified. The Subcommittee was also authorized to identify misdemeanors that the Study Committee might consider either reducing to a forfeiture or elevating to a felony.

Subcommittee's Process

At the Subcommittee's August 6, 2014 meeting, the Subcommittee agreed to recommend classifying the majority of misdemeanors that are currently unclassified. It determined, however, that it should avoid altering the penalties for certain offenses that the Legislature has

either indicated a strong intent to treat differently than other types of offenses or offenses that may be controversial. Therefore, the Subcommittee directed that no changes be made to operating while intoxicated and drug offenses, or crimes related to elections and public officials.

The Subcommittee adopted a two-step process to develop a proposal for classification: first, the Subcommittee's staff would assign each unclassified misdemeanor to a class according to the principles the Subcommittee developed; next, the Subcommittee would review these preliminary classifications and make any adjustments it deemed necessary.

In developing the principles to guide the preliminary classification of unclassified misdemeanors, the Subcommittee expressed its intention to defer to prior legislative determinations about the severity of offenses, and to organize unclassified misdemeanor offenses by using the three classes currently used in the Criminal Code.⁴ Accordingly, the Subcommittee directed that where the current punishment for an unclassified misdemeanor is exactly the same as the penalty prescribed for a particular misdemeanor class, the misdemeanor be placed into that class.

Where a misdemeanor's current penalty does not fit exactly into the ranges of the three existing classes, the Subcommittee directed that the misdemeanor be classified based on the amount of jail time prescribed under current law, reasoning that the amount of jail time may more clearly indicate legislative determinations about the severity of offenses than fine amounts. For offenses in which the maximum amount of jail time corresponds exactly to the amount of jail time prescribed for an existing class, the offense was to be placed within that class.

For offenses that are currently penalized with a maximum amount of jail time that lies between two existing classes or is greater than nine months, the Subcommittee directed that the crime be placed in the lower class or in Class A, respectively. In developing this principle, Subcommittee members articulated their desire to avoid creating periods of incarceration greater than prior Legislatures had determined were appropriate, and noted that the periods of incarceration provided by each of the classes is generally sufficient to cover most circumstances. Finally, the Subcommittee directed that misdemeanors that are currently punished by a fine only not be classified because classification would add, as a possible penalty, jail time for offenses the Legislature had previously chosen not to punish by incarceration.

⁴ The three classes of misdemeanors and their corresponding penalties are as follows:

- Class A, punishable by a term of imprisonment not to exceed nine months, a fine not to exceed \$10,000, or both.
- Class B, punishable by a term of imprisonment not to exceed 90 days, a fine not to exceed \$1,000, or both.
- Class C, punishable by a term of imprisonment not to exceed 30 days, a fine not to exceed \$500, or both.

Subcommittee's Recommendations

At its October 17, 2014 meeting, the Subcommittee reviewed the preliminary classifications and adjusted them as it deemed necessary.⁵ In some cases, these adjustments were made in light of input from agency staff. In other cases, adjustments were made either because the Subcommittee's preliminary classification principles could not be applied to a particular misdemeanor or because applying these principles did not achieve the desired outcome.

The Subcommittee also revisited the topic of misdemeanors that are currently punished only by a fine. The Subcommittee recommended that offenses that the Legislature has chosen not to punish with a term of imprisonment should, in most cases, be civil forfeitures. The Subcommittee instructed staff to provide the Subcommittee with a list of fine-only misdemeanors for the Subcommittee members' review, and agreed that the Subcommittee would recommend that each misdemeanor on the list become a civil forfeiture with the exception of any offense a Subcommittee member identified before October 31, 2014, as one that should remain a misdemeanor.

The Subcommittee's recommendations are contained in the document titled "Recommendations of the Subcommittee on Penalty Alignment and Organization" posted on the committee's website.⁶ This document is a chart consisting of four columns. Those columns are titled as follows: (1) 2011 statute section; (2) summary of misdemeanor; (3) current penalty or penalty class; and (4) new penalty or class. The fourth column contains the Subcommittee's recommendations. Where the Subcommittee recommended that an unclassified misdemeanor be classified, the proposed class (A, B, or C) is indicated in this column. Where the Subcommittee has made a preliminary recommendation to change a misdemeanor that currently carries a penalty of a fine only to a forfeiture, this is indicated with the word "forfeiture." If a Subcommittee member, after reviewing the list of fine-only misdemeanors, identified an offense as one that should remain a misdemeanor, the comment "Do Not Decriminalize" is used.

Where the Subcommittee reviewed an offense but recommended the current penalties remain in place, the comment "Do Not Change" is used. However, note that the fourth column is blank for misdemeanors contained in the Criminal Code. Because these offenses are already classified, the Subcommittee did not recommend that any changes be made to these misdemeanors.

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⁵ The list of preliminary classifications was distributed to the Subcommittee with Memo No. 2, which is available on the Subcommittee's website.

⁶ The document titled "Recommendations of the Subcommittee on Penalty Alignment and Organization" consists of a modified version of the chart in the publication *Statutory Misdemeanors in Wisconsin* (LRB 13-WB-5), which was distributed to the Study Committee prior to its first meeting.